Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1911.

CHARLES T. PRESTON,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO et al.,
Defendants in Error.
No. 495.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.
FILED DECEMBER 30, 1910.

MOTION TO DISMISS WRIT OF ERROR OR AFFIRM JUDGMENT OF THE SUPREME COURT OF ILLINOIS.

NOTICE, MOTION, STATEMENT, BRIEF AND ARGUMENT.

JOHN W. BECKWITH,
ASSISTANT CORPORATION COUNSEL,
ATTORNEY FOR DEFENDANTS IN ERROR.

WILLIAM H. SEXTON,
CORPORATION COUNSEL,
OF COUNSEL.

BARNARD & MILLER PRINT, CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1911.

CHARLES T. PRESTON, *Plaintiff in Error,*
vs.
THE CITY OF CHICAGO ET AL., *Defendants in Error.*
No. 474.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS. FILED DECEMBER 30, 1910.

To A. B. CHILCOAT, ESQ.,
Attorney for Plaintiff in Error.

PLEASE TAKE NOTICE, That on Monday, June 3, 1912, at the opening of said court, or as soon thereafter as counsel can be heard, the motion, a copy of which is hereto attached, will be submitted to said court for its decision thereon. Annexed hereto is a copy of the statement of the matter involved and brief and argument which will be submitted with said motion, in support thereof.

. . . . . ,
Assistant Corporation Counsel,
Attorney for Defendant in Error.

Received a copy of the above notice this .....
day of May, A. D. 1912.

.....,
Counsel for Plaintiff in Error.

IN THE

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OCTOBER TERM, A. D. 1911.

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Now come the defendants in error in the above entitled cause, by their attorney, and move the court to dismiss said writ of error, under rule 4 of the rules of this court, promulgated December 22, 1911, or, in the alternative, to affirm the judgment of the Supreme Court of the State of Illinois in accordance with the provisions of rule 5 of the rules promulgated December 22, 1911, on the ground—

First. That there is no such federal issue involved in said cause as to give this court jurisdiction; and

Second. That the contentions of plaintiff in error seeking to raise a federal issue in this cause are so frivolous as not to need further argument.

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Counsel for Plaintiff in Error.

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First. That there is no such federal issue involved in said cause as to give this court jurisdiction; and

Second. That the contentions of plaintiff in error seeking to raise a federal issue in this cause are so frivolous as not to need further argument.

STATEMENT.

This is a writ of error to the Supreme Court of the State of Illinois to review the judgment of that court affirming the judgment of the Superior Court of Cook County, denying a writ of mandamus to the relator in this cause. The judgment was rendered in the Superior Court of Cook County after a demurrer of defendants to an amended and supplemental petition had been sustained.

In the petition it is averred, *inter alia*, that petitioner became a police patrolman of the City of Chicago June 1, 1886, and continued as such until March 4, 1898, on which date he was discharged by the General Superintendent of Police without charges having been preferred against him and without any trial upon any charges of any nature against him, and without the written concurrence of the then Mayor of the City. (Rec., 18.) These allegations are made upon information and belief.

The original petition was filed March 11, 1903. The alleged discharge of relator from the police force was March 14, 1898, leaving a period of five years lacking three days between the dropping of petitioner's name from the payroll and the filing of the petition. On December 2, 1908, the amended petition was filed. The petition is voluminous and fully set forth in the record (pages 8 to 22, inclusive), but the above statement, we think, contains sufficient for the purposes of this motion.

The Supreme Court of Illinois in affirming the judgment below did so upon four grounds (Rec., 25):

First. That the petitioner, a police patrolman, at the time of classification of places of employment by the Civil Service Commission of the City of Chicago, did not thereby become an officer of the classified service and entitled to the protection conferred by that act against removal.

Second. That there was no such office as that of police patrolman in the City of Chicago at the time of the filing of the amended and supplemental petition.

Third. That the removal of petitioner without notice and upon written charges and without an opportunity to be heard was not in violation of Section 2 of Article A of the State Constitution and Section 1 of the Fourteenth Amendment of the Federal Constitution.

Fourth. That the defense of laches raised in this case was an adequate and complete defense to the action.

POINTS AND AUTHORITIES.

Ia.

IF THE DECISION OF THE STATE COURT IS UPON GROUNDS BROAD ENOUGH TO SUPPORT THE JUDGMENT INDEPENDENT OF ANY FEDERAL QUESTION, THERE IS NO FEDERAL ISSUE INVOLVED IN THE CASE SO AS TO GIVE THIS COURT JURISDICTION AND IT WILL NOT ENTERTAIN A WRIT OF ERROR.

Rutland Railroad Co. v. *Central Vermont R. Co.*, 159 U. S. 630.

Klinger v. *Missouri*, 13 Wall. (U. S.) 263.

Capital National Bank v. *Cadiz First National Bank*, 172 U. S. 425.

Harrison v. *Morton*, 171 U. S. 38.

Pierce v. *Somerset R. Co.*, 171 U. S. 641.

Wade v. *Lawder*, 165 U. S. 624.

Bacon v. *Texas*, 163 U. S. 207.

Seneca Nation v. *Christy*, 162 U. S. 283.

Gillis v. *Stinchfield*, 159 U. S. 658.

Ib.

THIS COURT WILL NOT DISTURB THE JUDGMENT OF A STATE COURT RENDERED UPON THE QUESTION OF LACHES.

Moran v. *Horsky*, 178 U. S. 205.

Pittsburgh, etc., Iron Co. v. *Cleveland Iron Min. Co.*, 178 U. S. 270.

Marrow v. *Brinkley*, 129 U. S. 178.

Rutland R. Co. v. *Central Vermont R. Co.*, 159 U. S. 630.

II.

THE OPINION OF THE STATE COURT IS TO BE LOOKED TO FOR THE PURPOSE OF SHOWING WHETHER A PARTICULAR QUESTION WAS CONSIDERED AND DECIDED IN DETERMINING WHETHER THIS COURT MAY TAKE JURISDICTION.

San Jose Land, etc., Co. v. *San Jose Ranch Co.*, 189 U. S. 180.

Mallett v. *North Carolina*, 181 U. S. 589.

Egan v. *Hart*, 165 U. S. 188.

Dibble v. *Bellingham Bay Land Co.*, 163 U. S. 63.

Sayward v. *Denny*, 158 U. S. 180.

Kreiger v. *Shelby R. Co.*, 125 U. S. 39.

Crescent City Live Stock Co. v. *Butchers' Union Slaughter House Co.*, 120 U. S. 141.

Philadelphia Fire Ass'n v. *New York*, 119 U. S. 110.

Gross v. *U. S.*, 108 U. S. 477.

Crossley v. *New Orleans*, 108 U. S. 105.

Murdock v. *Memphis*, 20 Wall. (U. S.) 590.

Delmas v. *Merchants' Ins. Co.*, 14 Wall. (U. S.) 661.

III.

WHILE THE ASCERTAINMENT OF THE EXISTENCE OF DUE PROCESS OF LAW IS THE FINAL PROVINCE OF THIS COURT, NEVERTHELESS, WHERE THE STATE COURT HAS DECIDED THAT A PARTICULAR FORMALITY WAS OR WAS NOT ESSENTIAL UNDER THE STATE STATUTE, SUCH DECISION PRESENTS NO FEDERAL QUESTION.

Castillo v. *McConnico*, 168 U. S. 674.

Pittsburgh, etc., R. Co. v. *Backus*, 154 U. S. 421.

Kentucky R. Tax Cases, 115 U. S. 322.

Davidson v. *New Orleans*, 96 U. S. 97.

Baltimore Traction Co. v. *Baltimore Belt R. C.*, 151 U. S. 137.

Marchant v. *Pennsylvania R. Co.*, 153 U. S. 380.

IV.

PLAINTIFF IN ERROR HAS NO PROPERTY RIGHTS IN THE EMOLUMENTS OF THE POSITION OR OFFICE OF POLICE PATROLMAN, AND, THEREFORE, HAS SUFFERED NO DEPRIVATION THEREOF IN VIOLATION OF THE FEDERAL CONSTITUTIONAL GUARANTIES.

People v. *Kipley*, 171 Ill. 44, 71.

Donahue v. *County of Will*, 100 Ill. 94.

State v. *Hawkins*, 44 Ohio St. 98.

V.

NOR IS PLAINTIFF IN ERROR DEPRIVED OF HIS PROPERTY WITHOUT DUE PROCESS THROUGH BEING RENDERED INELIGIBLE FOR A POLICE PENSION BY THE CITY'S ACTION, SINCE THERE IS NO PROPERTY RIGHT IN A PENSION WHICH IS MERELY A LARGESS OR GRATUITY.

Morgan v. *People*, 216 Ill. 437, 449.

Walton v. *Cotton*, 19 How. 355.

Frisbie v. *U. S.*, 157 U. S. 160.

26 Am. & Eng. Ency. of Law, (2nd Ed.) 658.

ARGUMENT.

PLAINTIFF IN ERROR IS ONE OF A CLASS CONSISTING OF FORMER POLICE PATROLMEN OF THE CITY OF CHICAGO, CONCERNING THE LEGALITY OF WHOSE REMOVAL FROM SUCH POSITION THE COURTS OF ILLINOIS HAVE ANNOUNCED DECISION IN THE FOLLOWING CASES:

Stott v. *City of Chicago*, 205 Ill. 281.
McNeill v. *City of Chicago*, 212 *id.* 481.
Kenneally v. *City of Chicago*, 220 *id.* 485.
Schultheis v. *City of Chicago*, 240 *id.* 167.
People v. *City of Chicago*, 242 *id.* 561.
Preston v. *City*, 246 *id.* 26.
Gersch v. *City of Chicago*, 250 *id.* 551.

The last named cause is now pending in this court.

In all of these cases the right of the petitioners to become reinstated upon the police force of the City of Chicago has been denied by the highest tribunal of this state.

In all these cases contentions similar to those in the one at bar have been raised by the respective appellants or plaintiffs in error.

In the case of Kenneally and Schultheis, *supra*, and the one at bar various contentions were raised by appellants in the State Supreme Court as ground for the reversal of the judgment of the lower court, and the State Supreme Court not only decided these contentions adversely to the petitioners, but also decided that in each of said cases the petitioners had

been guilty of such *laches* as to defeat their rights, if any they had.

In this case the petitioner slept upon such rights as he might have had from March 14, 1898, until March 11, 1903, a period of five years lacking three days.

Concerning such apparent acquiescence on the part of one removed from the police force, the State Supreme Court say in *Kennedy* v. *City*, *supra* (p. 502):

> "In addition to what has been said, it is clear that the appellant has been guilty of laches in not sooner presenting his application for restoration to the position, which he claims. 'The granting of the writ of mandamus is discretionary with the court in view of all the existing facts, and with due regard to the consequences which may result.' (*People* v. *Ketchum*, 72 Ill. 212; *People* v. *Board of Supervisors of Adams County*, 185 *id.* 288.) In *People ex rel.* v. *Board of Supervisors*, 185 Ill. 288, we said (p. 293): Courts, in granting or refusing writs of mandamus, exercise judicial discretion, and are governed by what seems necessary and proper to be done in the particular instance for the attainment of justice. Courts, in the exercise of wise, judicial discretion, may, in view of the consequences attendant upon the issuing of a writ of mandamus, refuse the writ, though the petitioner has a clear legal right for which mandamus is an appropriate remedy.' It has been said that 'the writ is not granted as a matter of absolute right, and where it can be seen that it cannot accomplish any good purpose, or that it will fail to have a beneficial effect, it will be denied.' (*Cristman* v. *Peck*, 90 Ill. 150; *People* v. *Lieb*, 85 *id.* 484; *Illinois Watch Case Co.* v. *Pearson*, 140 *id.* 423.) It has also been held that the writ of mandamus, being a discretionary

writ, will only issue in a case where it appears by law that it ought to issue, and the court will not order it in doubtful cases. (*Commissioners of Highways* v. *People*, 4 Ill. App. 391.) In *People ex rel.* v. *Davis*, 93 Ill. 133, we said: 'The court exercises a discretion in granting or refusing the writ, and, if the right be doubtful, it will be refused.' It has been held that the writ will be refused where the granting of it will disarrange the public service. (*People ex rel.* v. *Palmer*, 38 N. Y. Supp. 652.)"

In the case of *Schultheis* v. *City of Chicago*, 240 Ill. 167, petitioner had delayed bringing his suit for the identical period of time involved in the present suit, namely, five years lacking three days. In discussing the question of laches, the court say (p. 169):

"It is urged in support of the demurrer that it appears from the petition as finally amended that the petitioner was guilty of such laches in bringing his action as barred any right that he might otherwise have had, and this contention finds support in the case of *Kenneally* v. *City of Chicago*, 220 Ill. 485, which is squarely in point. Kenneally and Schultheis were both appointed policemen of the city of Chicago in 1888. The names of both were dropped from the police pay-roll on the same day, March 14, 1898. Kenneally filed his original petition for mandamus on January 24, 1900. Schultheis filed his original petition for mandamus on March 11, 1903. Kenneally filed his amended petition, to which a demurrer was sustained and by which he elected to abide, on December 19, 1904. In the Kenneally case we held that the appellant had been guilty of such laches as authorized the trial court to sustain the demurrer to the petition, and if that case be followed on the question of laches the judgment in the case at bar must be affirmed, as no attempt is made by the petition-

er's pleading to show any excuse for the delay. Schultheis is represented by the same counsel who represented Kenneally, and they argue that the earlier case is wrong. We have upon their insistence again examined the questions involved and deem it necessary to notice in this opinion but one criticism of the former case. It is asserted with great vigor that laches cannot be relied upon as a defense in any suit at law, and it is said, to quote the language of counsel, 'laches is a defense which may be interposed in a court of equity only.'

This is a mistake. Cases are common in this court in which laches has been regarded as affording a defense in proceedings in *quo warranto* and in proceedings in *certiorari*, both of which are at law. *Clark* v. *City of Chicago*, 233 Ill. 113; *City of Chicago* v. *Condell*, 224 *id.* 595; *People* v. *Hanker*, 197 *id.* 409; *Trustees of Schools* v. *School Directors*, 88 *id.* 100; *People* v. *Schnepp*, 179 *id.* 305.

In the case cited from the 233d we held that a member of the Chicago police force claiming to have been wrongfully removed would be barred by laches from his right to have the record of the civil service commissioners reviewed by *certiorari* if he delayed more than six months in beginning his suit unless the delay was satisfactorily explained by the petition for the writ. We are satisfied that we should adhere to the Kenneally case."

The Supreme Court of the State in the present case say (Rec., 25):

"The material and vital questions raised on this record are: * * *

Fourth, that the writ of mandamus is a writ of right; that the time limited for commencing the action is five years; that nothing short of that time can be urged or considered against the right to maintain it; that a defense based upon a lapse of time must be pleaded and that laches

> is not applicable. We held otherwise in *Kennedy v. City of Chicago, supra*, and *Schultheis v. City of Chicago*, 240 Ill. 167. We could not reverse the judgment in this case without overruling our decisions in those cases, and we are not convinced that we would be justified by the law in overruling them.

It thus appears that the question of laches has not only been determined against the contentions of plaintiff in error in the State Court in the present case, but that the well settled law of Illinois upon this question was followed in that decision, and that in the Schultheis case, *supra*, the exact period of time during which present plaintiff in error neglected to assert his rights in this case was there considered by the court.

In *Rutland Railroad Co. v. Central Vermont R. Co.*, 159 U. S. 630, the decision of the state court, to which the writ of error ran from this court, did not proceed exclusively on the decision of the federal question, but also upon questions of general law. The state court decreed that the Rutland Company, in a court of equity, could not have relief for what, by its own laches, it had suffered to be done, professedly in its behalf, by the Central Vermont Company. Beside this non-federal question, rights under the federal constitution were also decided by the court in its decree.

Concerning the non-federal question, this court say (p. 640):

> "These grounds involved no Federal question, and were broad enough to support the judgment, without regard to the question whether the provision of the statute, under which the Central Vermont Company paid the

taxes and deducted them from the rent, was or was not constitutional.

Such being the case, the conclusion is inevitable, that this court has no jurisdiction to review the decision of the state court.

It is well settled, by a long series of decisions of this court, that where the highest court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the Federal question. *Murdock* v. *Memphis*, 20 Wall. 590; *Jenkins* v. *Loewenthal*, 110 U. S. 222; *Beaupre* v. *Noyes*, 138 U. S. 397; *Walter A. Wood Co.* v. *Skinner*, 139 U. S. 293; *Hammond* v. *Johnston*, 142 U. S. 73; *Tyler* v. *Cass County*, 142 U. S. 288; *Delaware Co.* v. *Reabold*, 142 U. S. 636; *Eustis* v. *Bolles*, 150 U. S. 361; in the last two of which many other cases to the same effect are cited."

In the case at bar three of the four questions decided by the state court are questions of general law. The third question alone is claimed to be a federal one. (Rec., 25.)

In *Marrow* v. *Brinkley*, 129 U. S. 178, the question of laches was raised in the state court as well as the federal question. The state court decided the case upon the question of laches. This court say (p. 181):

"Unless it appears affirmatively that the decision of a Federal question was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it, this court has no jurisdiction of a writ of error to a state court. In this case the judgment as rendered involved the decision of no

such question, and none such was actually decided."

In *Moran* v. *Horsky*, 178 U. S. 205, the Supreme Court of the state affirmed the decree of the trial court primarily on the ground of laches. The court say (p. 207):

> "If this be an independent ground, involving no question under the Federal statutes, the decision of the Supreme Court must be sustained and the writ of error dismissed. *Eustis* v. *Bolles*, 150 U. S. 361. * * *
>
> We conclude, therefore, that the defense of laches, which in its nature is a defense conceding the existence of an earlier legal or equitable right, and affirming that the delay in enforcing it is sufficient to deny relief, is the assertion of an independent defense. It proceeds upon the concession that there was under the laws of the United States a prior right, and, conceding that, says that the delay in respect to its assertion prevents its present recognition. For these reasons we are of the opinion that the decision of the Supreme Court of Montana was based upon an independent non-Federal question, one broad enough to sustain its judgment, and the writ of error is dismissed."

In *Pittsburgh, etc., I. Co.* v. *Cleveland I. Min. Co.*, 178 U. S. 270, a motion was made in this court to dismiss for want of jurisdiction on the ground that no federal question was raised in the state court, or, if one was raised, the decision of the state court rested on a question not Federal, which was sufficient to sustain the judgment. The court say (p. 279):

> "It is manifest that the Supreme Court rested its decision on the grounds (1) that the pumping contract was a settlement of boundaries between the contestants; (2) that what was done

and expended under it worked an estoppel against the plaintiff; (3) laches of the plaintiff, in asserting its claim whereby the *status quo* could not be restored.

It requires no argument to demonstrate that neither of these grounds involves a Federal question. But plaintiff in error contends that they were all made to depend upon a Federal question, which the court erroneously decided, and, therefore, that they necessarily involve such question. * * *

"But whether plaintiff did or did not own land of Section 10 which could be or could not be measured by metes and bounds; whatever its rights and the rights of the other parties were, they could be settled by agreement, and could be made the foundation of business transactions and enterprises. The Supreme Court determined they were so made and could be so made under the laws of Michigan.

But again, and whatever the error in that conclusion (we do not assert there was any), the court decided, as an independent ground of estoppel, that plaintiff was guilty of laches, and that was sufficient to sustain its judgment.

The case must, therefore, be dismissed for want of jurisdiction, and it is so ordered."

In *Harrison* v. *Morton*, 171 U. S. 38, the court say (p. 46):

"It is manifest that the pleadings of the parties presented for decision other questions besides Federal ones, and which could be, independent of the Federal ones, determinative of the controversy. Assuming, therefore, that a Federal question was involved, it does not appear but that the decision was given on the contention of the defendant that the agreement never became operative for want of delivery. This contention was clearly presented by defendant's prayers, and they contained the only rulings urged upon the court in that way, that

is, in the nature of instructions. They were given and the verdict was generally for the defendant. It is, therefore, natural to presume that the verdict was rendered on account of them and on the ground urged by them. The ruling of the court granting them was sustained by the Supreme Court of the state. It affirmed the ruling as correct in law and as supported by competent testimony. The Supreme Court, it is true, passed on other grounds, passed on the one which it is claimed involved a Federal question, and decided it adversely to plaintiff. But the rule in such cases has been repeatedly declared by this court. It is not necessary to review the decisions. That has been done by Mr. Justice Shiras in *Eustis* v. *Bolles*, 150 U. S. 361. It is sufficient to announce the rule pronounced in that case:

'It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635.

'It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.' See also *Wade* v. *Lander*, 165 U. S. 624.

The writ of error must therefore be dismissed."

It is perfectly apparent from the decision of the Supreme Court of Illinois in the above case that the plaintiff in error was held to be estopped upon the ground of laches irrespective and independent of any other point presented to the Supreme Court. If all the other points had been decided favorably to his contentions, he would still have been barred by the decision upon the question of laches.

The cause here is not impressed with a federal question sufficient to retain the writ of error in this court against the motion to dismiss.

In *Capital National Bank* v. *First National Bank of Cadiz*, 172 U. S. 425, it is said (p. 430):

> "Moreover, even though a Federal question may have been raised and decided, yet if a question, not Federal, is also raised and decided, and the decision of that question is sufficient to support the judgment, this court will not review the judgment."

In *Castillo* v. *McConnico*, 168 U. S. 674, the court say (p. 679):

> "To decide the issue as to jurisdiction, we will at the outset ascertain whether a Federal question was necessarily involved in the decision of the State Supreme Court. Even though it be that a Federal controversy was decided, nevertheless if the questions of a purely state character, upon which the Supreme Court of Louisiana passed, are completely adequate to sustain the decree by that court rendered, wholly independent of the Federal question, it will result that no Federal issue is presented for review. *Egan* v. *Hart*, 165 U. S. 188, 191; *Powell* v. *Brunswick County*, 150 U. S. 433, 441, and authorities referred to in both of the foregoing cases."

CONCLUSION.

We will not attempt to burden the court with a further argument or detailed citation from the other cases cited in our brief. The decision of the State Supreme Court in the case at bar decides three questions involving no federal issues, one of which is the question of laches. It also decides that the action of the lower court was not in violation of relator's constitutional guaranties, and we have put our motion in the alternative for the reason that we conceive that either a dismissal of the writ of error would be proper under rule 4, or an affirmance of the judgment of the State Supreme Court may be ordered by this court under rule 5.

The whole contention of the plaintiff in error appears to us distinctly frivolous so far as the presentation of any legitimate federal question is concerned. With respect to the procedure in this case, we are not concerned whether the court dismisses the appeal or affirms the judgment below.

We, therefore, ask that if the court approve the contentions herein advanced, it either dismiss the writ of error or affirm the judgment below.

Respectfully submitted,

JOHN W. BECKWITH,
Assistant Corporation Counsel,
Attorney for Defendants in Error.

WILLIAM H. SEXTON,
Corporation Counsel,
Of Counsel.